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No. 80-1666

IN THE

Supreme Court of the United States

October Term 1980.

JOHN R. LARSON, etc., *et al.*,

Appellants,

vs.

PAMELA VALENTE, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit.

BRIEF OF APPELLEES.

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QUESTIONS PRESENTED.

1. Whether the Minnesota Charitable Solicitation Act, which expressly favors some religions over others by exempting only some religious organizations from rigorous requirements, and which lacks constitutionally sufficient justification for the explicit differentiation, violates the first amendment's guarantee of neutrality and hence works an unconstitutional establishment of religion.

2. Whether the religious classification on the face of the exemption provision, which imposes material burdens on certain religious organizations but not on others, has an impermissible primary effect of advancing or inhibiting religion; or, whether substantive provisions of the Act, as applied to religious organizations, foster an excessive government entanglement with religion.

3. Whether appellees, who have alleged injury in fact as a result of the Act, and against whom the Act is being enforced, have standing to raise establishment-clause claims.

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Appellees.

BRIEF OF APPELLEES.

STATEMENT OF THE CASE.

1. The statutory scheme.

Prior to 1978, Minnesota, like virtually every other state regulating the solicitation of charitable contributions, exempted all religious organizations soliciting for religious purposes from the coverage of its statute. In 1978, however, the state amended its Charitable Solicitations Act expressly to exempt some, but only some, religious organizations from the Act's requirements, thereby selectively according favored status to only a limited class of religious organizations. Minn. Stat. § 309.515(1) (b) (1980).[1] The consti-

[1]To appellees' knowledge, North Carolina is the only state other than Minnesota which has adopted a similar explicitly selective regulation of churches in the present context. The North Carolina law was held unconstitutional on establishment grounds by that state's supreme court. *Heritage Village Church & Missionary Fellowship, Inc. v. State*, 299 N.C. 399, 263 S.E.2d 726 (1980); see Jt. App. A-143 & *id.* n. 8, 637 F.2d 562, 569 & *id.* n. 8 (8th Cir. 1981).

tutionality of the 1978 amendment is the subject of this appeal. The appeal thus directly presents the Court, for the first time, with the question of whether a law expressly classifying religious organizations for differential treatment works an unconstitutional establishment of religion.

The Minnesota Charitable Solicitations Act, Minn. Stat. Ann. §§ 309.50-.61 (1980) [hereinafter cited as the Act],[2] sets up an intricate system of state registration, reporting, investigation and enforcement. Under the Act, any non-exempt charitable organization, including any non-exempt religious organization,[3] is prohibited from "solicit[ing] contributions from persons in th[e] state by any means whatsoever unless, prior to any solicitation, there shall be on file with the department of commerce . . . a registration statement. . . ." *Id.* § 309.52. The Act demands, among other things, that the registrant identify the "form of organization" and the "general purposes for which [it is] organized;" identify the "general purposes for which contributions to be solicited will be used" and the "methods by which solicitation will be made;" and provide "such other information as the department may by rule or order require." *Id.* § 309.52(1) (c), (j), (k), (*l*), (p).

The Act further requires all non-exempt organizations, including non-exempt religious organizations, to prepare and to keep records and to file reports not required of exempt

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[2]The Act is reprinted at Jur. St. A-70 to -96.

[3]A charitable organization is defined as any person or organization "who engages in or purports to engage in solicitation for a charitable purpose." Minn. Stat. § 309.50(4) (1980). Charitable purpose is, in turn, defined as "any charitable, benevolent, philanthropic, patriotic, religious, social service, welfare, educational, eleemosynary, cultural, artistic, or public interest purpose, either actual or purported." *Id.* § 309.50(3). Thus, a charitable organization within the meaning of the Act includes any organization that engages in solicitation for a religious purpose, *i.e.*, almost any religious organization or church.

organizations. A non-exempt organization must file an annual report with the state. *Id.* § 309.53(1). The report must include a financial statement, *id.* § 309.53(2), which, if in a given year more than $25,000 has been solicited from within or without the state, must be audited by a certified public accountant with respect to criteria specified by the state. *Id.* § 309.53(g), para. 2. The financial statement must contain "a balance sheet, statement of income and expense, and statement of functional expenses," *id.* § 309.53(3), and must disclose, *inter alia*, "[t]otal receipts and total income from all sources;" costs of management, of fund raising, and of public education; "[f]unds or properties transferred out of state, with explanation as to recipient and purpose;" and "[t]otal net amount disbursed within the state, broken down into total amounts disbursed for each major purpose." *Id.* § 309.53(3) (a)-(f).

The registration statement, annual reports, and all other information required to be filed under the Act are deemed "public records" available to the general public. *Id.* § 309.54(1). All of each non-exempt organization's internal books and records from which the data in the public filings are derived must "be open to inspection at all reasonable times by the department or by the attorney general." *Id.* § 309.54(2). Moreover, any non-exempt organization must "keep and maintain within Minnesota," for at least ten years, all of its "original books and records, or true copies thereof, pertaining to all money or other property collected from residents of this state and to the disbursement of such money or property." *Id.* § 309.54(3).

The department of commerce "may by order deny any application, . . . [or] suspend or revoke any license or registration," if it finds, for example, that the organization has "filed an application which is incomplete in any material respect or contains any statement which . . . is false or

misleading with respect to any material fact," has "engaged in a fraudulent, deceptive or dishonest practice," has previously been enjoined from engaging in solicitation, or has in any way "violated or failed to comply with any provision of [the Act]," *and* "that the order is in the public interest." *Id.* § 309.532(1). A registration may also be suspended or revoked if an organization fails to comply to the state's satisfaction with certain requests for information. *Id.* § 309.58.

The Act forbids any non-exempt organization to spend "an unreasonable amount for management and general costs and fund raising," and expenditure in excess of "30 percent of total income and revenue is presumed to be an unreasonable amount." *Id.* § 309.555(1a). A non-exempt organization that violates this prohibition "shall not be eligible to maintain registration with the department." *Id.* Moreover, the Act invests the commissioner of securities with broad, explicitly discretionary, powers to "make public or private investigations within or outside the state as he deems necessary to determine whether any person has violated or is about to violate any provision of [the Act]," *id.* § 309.533(1)(a), including powers of compulsory process for attendance of witnesses and for production of documents and records. *Id.* § 309.533(2).

As earlier noted, prior to 1978, the Act exempted all religious organizations from its registration and disclosure requirements.[4] In 1978, however, the Act was amended to exempt only *some* religious organizations, each

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[4]Prior to 1973, solicitations on behalf of religious organizations for religious purposes were excluded from coverage in Minnesota in the manner still generally prevalent elsewhere, simply by omitting "religious" from the statutory definition of charitable purpose. 1961 Minn. Laws ch. 309, § 1(3), *reprinted in* Minn. Stat. Ann. § 309.50(3) (West 1969). Thus, during that period, the Act by definition had no application to religious solicitations.

> religious society or organization which received more than half of the contributions it received in the accounting year last ended (1) from persons who are members of the organization; or (2) from a parent organization or affiliated organization; or (3) from a combination of the sources listed in clauses (1) and (2). A religious society or organization which solicits from its religious affiliates who are qualified under this subdivision and who are represented in a body or convention is exempt from the [registration and annual report requirements of the Act]. The term "member" shall not include those persons who are granted a membership upon making a contribution as a result of a solicitation.

Id. § 309.515(1)(b). Thus, as amended, the Act expressly accords favored status to those religious organizations that derive more than half their financial support from their own members[5] or from parent or affiliate organizations.

The Act's 1973 amendment, *inter alia*, expanded the definition in this regard. 1973 Minn. Laws ch. 762, § 2. However, the same 1973 statute also enacted § 309.515, which, as then written, provided a broad exemption for

> [a]ny group or association serving a bona fide religious purpose when the solicitation is connected with such a religious purpose. [N]or shall [§§ 309.52-.53] apply when the solicitation for such a purpose is conducted for the benefit of such a group or association by any other person with the consent of such group or association.

1973 Minn. Laws ch. 762, § 5.

It was the amendment in 1978 of § 309.515 that adopted the express selective exemption of religious organizations, 1978 Minn. Laws ch. 601, § 5, and created the presently existing statutory scheme.

[5]Despite the term's critical place in the statutory scheme, particularly with respect to the exemptions, the Act does not affirmatively define "member," the meaning of which in the context of the broad range of religious organizations is certainly not self-evident. Whether, for example, it refers to card-carrying members, self-styled believers, or something else is not stated. The only attempt at definition is the exclusion contained in the final sentence of Minn. Stat. § 309.515(1)(b) (1980), quoted in text, that itself may or may not be consistent with the internal policies of a given religious organization.

2. The proceedings below.[6]

The action underlying the present appeal was filed in the United States District Court for the District of Minnesota on October 11, 1978, pursuant to 42 U.S.C. § 1983 (1976), seeking a declaration that the Minnesota Charitable Solicitations Act is violative of the first and fourteenth amendments and an injunction against its enforcement. The original plaintiffs were four members of the Holy Spirit Association for the Unification of World Christianity [hereinafter the Unification Church or the Church]. The defendants, appellants in this Court, were John R. Larson, the Minnesota Commissioner of Securities, and Warren Spannaus, the Minnesota Attorney General, the two state officials charged with enforcement of the Act [hereinafter, collectively, the state]. Jt. App. A-4.

Shortly after the filing of this action, the state initiated a proceeding in state court against the Unification Church, alleging that the Church was in violation of the Act. The parties thereafter entered into a stipulation pursuant to which the Unification Church was joined as a plaintiff in the federal action and the state action was stayed. Jt. App. A-14 to -17. The district court entered orders in conformance with the stipulation. *Id.* A-17 to -19.

In challenging the Charitable Solicitations Act, plaintiffs [hereinafter appellees] asserted that the Act, by selectively exempting only some religious organizations from its coverage, and thus expressly imposing substantial burdens on only non-exempt religious organizations, constitutes a forbidden establishment of religion. Appellees further maintained that the selective exemption violates the equal protection clause; that the imposition of the Act's registration

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[6]The Jurisdictional Statement and the Joint Appendix are cited in this brief in the form Jur. St. [page] and Jt. App. [page], respectively.

and disclosure requirements on religious organizations violates both the establishment and free exercise clauses because of the Act's provision for extensive state intrusion into, and systematic control and surveillance of, religious affairs, *see Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Catholic Bishop v. NLRB*, 559 F.2d 1112 (7th Cir. 1977), *aff'd on statutory grounds*, 440 U.S. 490 (1979); that the Act is facially unconstitutional in its application to non-exempt religious and non-religious solicitation centrally protected by the freedom of speech or free exercise clauses because the Act vests impermissibly broad discretion in state officials to "suspend or revoke" the right of such non-exempt organizations to exercise their first amendment right of solicitation, *see Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976); that the Act fails to provide the procedural safeguards necessary in the first amendment licensing context under the doctrine of *Freedman v. Maryland*, 380 U.S. 51 (1965); and that a variety of restrictions in the Act unduly burden the rights of freedom of speech and of the free exercise of religion as guaranteed by the first and fourteenth amendments, *see Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980). See Jt. App. A-3, -5 to -6.

For these reasons, appellees moved in conjunction with the filing of the complaint for a preliminary injunction against enforcement of the Act. On May 3, 1979, Magistrate (now Judge) Renner filed his Report and Recommendation concluding that the preliminary injunction should be granted, and that the state's motion to dismiss should be denied. Jur.

St. A-36 to -67.[7] On July 5, 1979, the district court, over objection by the state, upheld the magistrate's conclusions and issued the preliminary injunction. *Id.* A-35.

Thereafter, appellees moved for summary judgment, and the state responded with a cross-motion for partial summary judgment. On November 15, 1979, Magistrate Renner recommended that both motions be granted in part and denied in part. *Id.* A-20 to -34. His primary conclusion was that the Act constituted an establishment of religion because of its "failure to treat all religious organizations equally," thus rendering the Act "unconstitutional as it applies to religious organizations." *Id.* A-24.[8]

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[7]In recommending that the preliminary injunction be issued, the magistrate enumerated several grounds upon which he believed that a probability of success on the merits had been shown. One of these was the Act's violation of the establishment clause's inter-sectarian neutrality principle by virtue of the statute's "arbitrar[y]" 50% criterion. Jur. St. A-63.

The magistrate also found, however, that the Act probably violated the first amendment prohibition against excessive government entanglement, *id.* A-63 to -65; that the Act "fail[ed] to provide notice of what is required for a successful registration," *id.* A-55; that "the standards, or lack of them, for suspension or revocation of a registration" were impermissible, *id.* A-55 to -57; that the cease-and-desist provision (§ 309.534), constituted an invalid prior restrant, *id.* A-57 to -58; that the department's investigatory powers appeared overbroad, *id.* A-58; that the Act was in "apparent violation of the *Freedman* [*v. Maryland, supra*] standards," *id.* A-58 to -61; and, finally, that there were "serious questions as to whether the Act violates plaintiffs' rights of free exercise of religion, privacy and freedom of association." *Id.* A-65 to -66.

[8]In light of that conclusion, the magistrate found it "unnecessary to further consider the substantive provisions of the Act as they apply to religious organizations." Jur. St. A-24. Moreover, ruling prior to this Court's decision in *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), the magistrate stated that the "solicitation rights" of "non-religious organizations . . . do not give rise to the high degree of First Amendment protection afforded solicitations by those of a religious nature," and held that, in consequence, "[a]s to [non-religious solicitors], the Act is a legitimate exercise of the state's police power to regulate speech of a commercial nature." *Id.* A-25 (citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978)).

By order filed January 21, 1980, the district court granted summary judgment as recommended by Magistrate Renner. *Id.* A-18 to -19. The net effect of the judgment was to return the Act's coverage to the status quo existing prior to the 1978 amendment.

On January 7, 1981, the United States Court of Appeals for the Eighth Circuit affirmed most of the district court's conclusions. Jt. App. A-130 to -146, *Valente v. Larson*, 637 F.2d 562 (8th Cir. 1981). The court of appeals upheld appellees' standing to raise their establishment clause challenges to the Act's exemption of some religious organizations. *Id.* A-133, 637 F.2d at 564-65. Moreover, without reaching appellees' other challenges to the Act's constitutionality, the court held that the "inexplicable religious classification" embodied in the Act's religious exemption provision constituted an unconstitutional establishment of religion. *Id.* A-134 to -143, 637 F.2d at 565-69. With the selective exemption provision thus invalidated, the court held that the proper relief was to extend the exemption to all religious organizations, as was the case prior to the 1978 amendment, rather than to excise the exemption entirely, which would have had the effect of rendering the Act applicable to all religious organizations, a state of affairs the Minnesota legislature had never enacted into law. *Id.* A-143 to -144, 637 F.2d at 569-70.

Magistrate Renner recommended several additional rulings not at issue in the present appeal. He held that the challenge to § 309.534(1a) (cease-and-desist orders) was justiciable, Jur. St. A-24, and was unconstitutional, *id.* A-30 to -32; that, in light of the invalidation of the religious exemption, the claim with respect to the suspension and revocation provision was non-justiciable, *id.* A-26; and that § 309.581 (criminal penalties) was void. Jur. St. A-32. The state did not contest on appeal the district court's determination that § 309.534(1a) was unconstitutional.

In addition, the court of appeals vacated and remanded for "further development" the district court's conclusions that several provisions of the Act, not at issue in this appeal, could not constitutionally be applied to religious organizations, and that any organization claiming to be a religious organization should qualify for exemption. The state is thus free on remand to attempt to prove that the Unification Church is not a "religious organization" within the meaning of the Act, of the perimeters of this Court's decisions, and of the guidelines set forth in such cases as *Washington Ethical Society v. District of Columbia*, 249 F.2d 127 (D.C. Cir. 1957). Jt. App. A-145 to -146, 637 F.2d at 570-71.

The state filed its notice of appeal from the Eighth Circuit's judgment on March 23, 1981 and docketed the appeal in this Court on April 3, 1981. This Court noted probable jurisdiction on June 1, 1981.

SUMMARY OF ARGUMENT.

A. The establishment clause's command of inter-sectarian neutrality derives both from vital symbolism and from quite practical lessons of history. An essential symbolic function of the religion clauses is to assure that government stand clear of favoritism and even the appearance of favoritism in its dealings with different groups of believers. For the government to do otherwise threatens constitutional ideals of a rich diversity of faiths co-existing in a unified society. Moreover, expressly unequal laws, in their debate and in their operation after enactment, pose the serious practical risk of political division along religious lines.

A law that expressly classified religions by name for purposes of differential state regulation would surely call forth the absolute disapprobation of the first amendment. A law, such as that at issue here, that expressly classifies religious organizations with reference to other characteris-

tics for sharply unequal treatment by government, while perhaps not absolutely prohibited, is for similar reasons subject to stringent constitutional scrutiny.

Statutes of the kind framed here by Minnesota differ *toto caelo* from laws of general applicability that, in operation, merely prove to have disparate impacts on religious groups. Statutes with only such de facto effects not only present no direct affront to first amendment values, but are simply unavoidable in the practice of government. Laws that *explicitly* separate groups of religious organizations for unequal treatment, on the other hand, are rarely, if ever, necessary. Similarly, there is in the disparate impact case normally no cause to distrust the motives of legislators on account of incidental effect on religion, but in the case of express categorization, the risk of impermissible motivation is inherent, and should almost always be regarded as intolerable.

For these reasons, a law that utilizes an express religion criterion should be presumptively suspect. At minimum, such an enactment should be judicially salvable only upon a convincing showing that it is substantially related to a significant governmental interest.

B. The statute at issue here does not approach meeting that standard. Lacking a justification in the court of appeals, the state urges in this Court that religious organizations more than half internally funded are less likely to engage in fraudulent practices, and therefore are less needful, in the state's view, of close government supervision when they do solicit from the public than are those who receive more than half of their support from the public. Little apparent sense can be made of this asserted rationale. For example, under the statutory criterion, a religious organization may collect tens of millions of dollars from the Minnesota public and be exempt while another collecting just over ten thousand dol-

lars unmatched by member contributions would be fully subject to regulation.

If a rational basis underlies this scheme, and one is difficult indeed to discern, there is certainly no more than a rational basis. Because the statute, while containing exemptions other than religious, treats religious organizations alone in this particular insensible fashion, any basis for it becomes even more problematic. Thus, any conceivably appropriate constitutional standard for evaluating a law of this kind strongly counsels that Minnesota's selective religious exemption be invalidated.

C. This case invokes the fundamental strand of establishment clause doctrine of government neutrality as among groups of religious organizations. The three-fold test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which is of greatest utility in sorting out the subtle constitutional problems involved in the provision of government aid to all religions, is therefore unnecessary to apply here.

If *Lemon* is applied, however, the statute fails, first, the requirement that its principal or primary effect must neither advance nor inhibit religion because of the material fashion in which it treats religious organizations unequally. The Act also contravenes the principle of no excessive government entanglement. The religious organizations to which it applies are subjected to a comprehensive scheme of state investigation and constant surveillance. Moreover, the data with which the state is required to be supplied is coupled with a program that may be utilized to coerce the religious organizations involved to conform, for example, to a vaguely stated but plainly secular standard, the "public interest," potentially highly disruptive of the salutary autonomy counseled by the religion clauses and far too deeply imbued with the possibility of government direction.

D. Finally, appellees clearly have standing to maintain their claims of establishment-clause violation since they have alleged that the organization with which they are affiliated is a religious organization, and therefore that they are injured in fact by the selective exemption provision. In any event, appellees have been subjected to state enforcement of the statute at issue.

ARGUMENT.

I.

THE RELIGIOUS ORGANIZATIONS EXEMPTION OF THE MINNESOTA CHARITABLE SOLICITATIONS ACT VIOLATES THE ESTABLISHMENT CLAUSE.

A. The Minnesota religious exemption provision expressly favors some religious organizations over others and therefore is in conflict with the establishment clause's core guarantee of neutrality between sects.

Appellees have maintained that the Minnesota Charitable Solicitations Act is unconstitutional on several distinct grounds. See pp. 7-8, *supra*. Because Magistrate Renner and the district court on summary judgment, and the court of appeals as well, all found it necessary to address only the establishment clause issue, however, that is the only issue directly before the Court on this appeal. Every judge to consider that issue in this litigation has held the Act's selective exemption of only some religious organizations to constitute an unconstitutional establishment of religion.

At the outset, it is essential precisely to characterize the establishment clause issue presented in this case. Unlike the typical establishment clause controversy, which questions the constitutionality of government programs providing benefits to *all* religious organizations, *see, e.g., Wolman v. Walter*, 433 U.S. 229 (1977); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Walz v. Tax Commission*, 397 U.S. 664 (1970), this case involves an attempt by government expressly to grant a special benefit to some religious organizations, but to withhold it from others. The case thus poses a quintessential establishment clause violation for, as the Court has long recognized, "[t]he First Amendment mandates neutrality between religion and religion . . . ." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). *See also*

Walz v. Tax Commission, supra, 397 U.S. at 673. By expressly and purposefully providing special benefits to only some religious organizations, the Minnesota Charitable Solicitations Act violates the constitutional "require[ment that] the state . . . be a neutral in its relations with groups of religious believers . . . ." *Everson v. Board of Education,* 330 U.S. 1, 18 (1947); *accord, e.g., Zorach v. Clauson,* 343 U.S. 306, 314 (1952) ("The government must be neutral when it comes to competition between sects.").

Although the Court's analysis of establishment clause issues in cases involving the provision of benefits to *all* religious organizations requires careful consideration of a range of factors, *see Wolman v. Walter, supra,* 433 U.S. at 235-36, and cases cited, the Court has consistently and unambiguously declared that government may not "adopt programs or practices . . . which 'aid or oppose' any religion. This prohibition is absolute." *Epperson v. Arkansas, supra,* 393 U.S. at 106 (quoting *School District v. Schempp,* 374 U.S. 203, 225 (1963)). Since the establishment clause "requires that government . . . effect no favoritism among sects," when government violates the clause's "core" concept of neutrality, the absolutist component of the Clause compels an immediate result. *Walz v. Tax Commission, supra,* 397 U.S. at 695 (opinion of Harlan, J.). In such cases, "the inquiry . . . can end at this point. Neutrality . . . stand[s] as [a] barrier[] against the most egregious and hence divisive kinds of state involvement in religious matters." *Id.*

Indeed, the guarantee of neutrality is so fundamental to our democratic system that, in the almost two hundred years since adoption of the first amendment, the Court has not until now been presented with a law that expressly divides religious organizations into separate categories for differential governmental treatment. The infrequency of such leg-

islative acts is reflective of the clear constitutional consensus that government may not "single[] out . . . particular church[es] or religious group[s]" for special treatment. *See Walz v. Tax Commission, supra,* 397 U.S. at 673.[9]

It is true, of course, that the Charitable Solicitations Act does not expressly grant favored status to specific religions or religious organizations *by name;* that would be the paradigm violation of inter-sectarian neutrality. But that paradigm does not exhaust the establishment clause's guarantee that government "not aid, foster or promote one religion or religious theory against another." *Epperson v. Arkansas, supra,* 393 U.S. at 104. Indeed, statutory distinctions expressly according some religious organizations benefits while at the same time denying those benefits to others pose much the same threat to the constitutional guarantee of neutrality as laws distinguishing religious organizations by name, although perhaps in not quite so dramatic a manner.

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[9]The Court has recognized that governmental neutrality as defined in inter-sectarian terms is perhaps the most essential of the values that the establishment clause was intended to protect. *See School Dist. v. Schempp,* 374 U.S. 203, 216 (1963) ("[T]his Court has rejected unequivocally the contention that the Establishment Clause forbids *only* governmental preference of one religion over another.") (emphasis added).

The Court's treatment of the question is fully consistent with the setting in which the establishment clause was developed. Thus, one study has concluded that, while the history is of course not without some uncertainty, "the proposals which must have been foremost in the minds of the legislators in the First Congress indicated the popular demand for an end to preferential treatment to religions and its concomitant restriction of the right to liberty of religion." C. Antieau, A. Downey & E. Roberts, *Freedom from Federal Establishment* 132 (1964). Moreover, for example, "in every state constitution in force between 1776 and 1789 where 'establishment' was mentioned, it was equated or used in conjunction with 'preference.' " *Id.*; *see id.* at 132-33 (quoting N.J. Const. of 1776, art. XIX; N.C. Const. of 1776, art. XXXIV; Del. Const. of 1776, art. 29; N.Y. Const. of 1777, art. XXXV; Mass. Const. of 1780, pt. I, art. III).

This is not a case, as the state persistently maintains, in which the legislation has a mere de facto, "disparate impact" upon different religious organizations. Brief for Appellants at 20, 21. The state's is, indeed, a fundamental mischaracterization of the Act. A law has a de facto, disparate impact when it is wholly neutral on its face with respect to the criterion at issue, but in operation falls more heavily upon some groups than others. The Charitable Solicitations Act prior to the 1978 amendment, for example, was neutral on its face with respect to different religious organizations, but might have had differential effects upon such organizations in operation.

Similarly, as the state correctly points out, "[a] religious organization which operates a college, builds a church, operates a radio station, sells securities, or owns real estate for charitable purposes will undoubtedly be more affected by legislation in these areas than those that do not." Brief for Appellants at 25 (footnotes omitted). The Minnesota Charitable Solicitations Act, however, is radically different. As presently in force, the Act *expressly* grants an exemption to some religious organizations but not to others. The "disparate impact" is thus de jure rather than de facto. It is mandated on the face of the legislation, and is not a mere incidental effect of the legislation in operation.

This distinction, so familiar in the equal protection field, is central to the analysis of the establishment clause as well. *Compare Personnel Administrator v. Feeney*, 442 U.S. 256 (1979) (disparate impact of facially neutral law in equal protection context) *and Washington v. Davis*, 426 U.S. 229 (1976) (same) *with Gillette v. United States*, 401 U.S. 437 (1971) (same in establishment clause context). *Cf. Walz v. Tax Commission, supra*, 397 U.S. at 696 (opinion of Harlan, J.) ("Neutrality in its application requires an equal protection mode of analysis."). Almost all laws will, in operation,

have some differential effects upon some racial, gender, or religious groups. To treat the existence of such differential effects as presumptively invalid would thus call into question the constitutionality of much, perhaps most, of our legislation. Thus, under equal protection analysis, it is settled that when a law, neutral on its face, "has a disparate impact upon a group that has historically been the victim of discrimination," the law must nonetheless be upheld so long as the impact can "be plausibly explained on a neutral ground" and the party challenging the law cannot demonstrate that it is the product of "purposeful discrimination." *Personnel Administrator v. Feeney, supra,* 442 U.S. at 275, 274; *see City of Mobile v. Bolden,* 446 U.S. 55 (1980); *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977); *Washington v. Davis, supra.*

The establishment clause may also be violated by a law that "on its face makes no discrimination between religions, for the Establishment Clause forbids subtle departures from neutrality, 'religious gerrymanders,' as well as obvious abuses." *Gillette v. United States, supra,* 401 U.S. at 452. But an individual who claims that a law that does not on its face "discriminate on the basis of religious affiliation or religious belief" is nonetheless violative of the establishment clause because it "works a de facto discrimination among religions" must "show the absence of a neutral, secular basis for the lines government has drawn." *Id.* at 450, 451, 452. For as the state observes, "[g]iven the limitless variety of activities of religious organizations, the fact that secular legislation will necessarily affect some religious organizations more than others cannot be denied, nor can an unrealistic demand for identical effects be imposed." Brief for Appellants at 24-25.

The situation here is quite different. Although the challenged Act does not accord disparate treatment to different religious organizations by name, it expressly grants favored status to some religious organizations while denying such status to others. There are several critical differences between laws having only a de facto disparate impact on religious organizations and those, like the Act, that *expressly* distinguish between such organizations. The use of a religion criterion on the face of legislation is, in a fundamental sense, symbolically inappropriate under the establishment clause. Favoritism is built directly into the legislation, a fact which is in itself of central importance.

Moreover, unlike de facto disparate effects, the express use of a religion criterion on the face of legislation is usually readily avoidable, as demonstrated by the fact that, until now, legislators have managed almost without exception to avoid the use of express statutory distinctions between religious organizations. Thus, unlike the mere disparate impact situation, where invalidation because of disparate impact would usually prevent the government from achieving whatever legitimate interest is served by the law, invalidation because of the express use of a religion criterion would usually still leave government free to achieve most if not all of its interests by simply rewriting the law to eliminate the unconstitutional use of the religion criterion. In this very case, for example, the state could re-write the Act to grant the exemption to all religious organizations; it could grant the exemption to no religious organizations; or it could eliminate the religion criterion entirely by treating religious organizations no differently from all other charitable organizations. At a bare minimum, the burden should be on government convincingly to demonstrate why it is necessary expressly to accord favored status to some religious organizations and not to others.

There is, moreover, another more subtle, but no less important, difference between the mere de facto situation and the sort of problem posed by the Charitable Solicitations Act. Stated simply, there is a much greater danger of improper legislative motivation, in the form of either favoritism or hostility, where a law speaks expressly in terms of religion than where it is neutral on its face but has only a disparate religious impact. The more a law focuses expressly upon so constitutionally sensitive a consideration, the more likely it is that legislators, consciously or unconsciously, will be affected in their deliberations by their expectations as to the likely impact of the legislation. A law that expressly grants a benefit to some religious organizations and not others is, in general, more likely to be tainted by subtle, but constitutionally impermissible, considerations than a law that treats all religions equally. As Justice Jackson has in another setting noted, "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Railway Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson J., concurring); *see Walz v. Tax Commission, supra*, 397 U.S. at 689 (Brennan, J. concurring) ("The very breadth of [a] scheme" exempting churches along with numerous other charitable institutions from real property taxes "negates any suggestion that the State intends to single out religious organizations for special preference.").

Moreover, "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." *Lemon v. Kurtzman, supra*, 403 U.S. at 622. In this context, it is clear, that when a law which expressly grants state favoritism to some religious

organizations but not to others is introduced and debated in a legislative body, the potential for those very dangers to materialize is greatly exacerbated. The potential may be expected to heighten if such a law is actually enacted and thereafter enforced. Thus, while it cannot be gainsaid that "religious values pervade the fabric of our national life," *id.* at 623, the direct injection into the political arena of explicit lines of religious discussion will upset the constitutional equilibrium sought to be maintained by the establishment clause. Stringent judicial scrutiny of laws of this kind is, therefore, essential.

These concerns are illustrated by this case. Under the Charitable Solicitations Act, with minor exceptions, the only religious organizations granted an exemption from the registration and disclosure requirements are those that derive more than half their financial support from their own members or from parent or affiliate bodies. As a consequence, large, traditional congregations tend to qualify for the exemption. Indeed, in the list of registered organizations submitted to the district court, Jt. App. A-19 to -124, one searches in vain for the name of any Catholic or "mainstream" Protestant church or Jewish synagogue. Although the separately organized charitable affiliates of some major churches, such as Catholic Welfare Services of Minneapolis and Lutheran Social Service of Minnesota, are not exempt, the record supplies a ready inference that the churches themselves are. No matter how much money one of these traditional churches raises from the public, and no matter how it is organized to provide information to its membership about its financial practices, it is exempt.

On the other hand, "religions which spread their beliefs in more evangelical, less traditional ways," are less likely to be exempt. *Heritage Village Church & Missionary Fel-*

lowship, Inc. v. State, 299 N.C. 399, 411, 263 S.E.2d 726, 737 (1980). The burdens of the Act will predictably fall with greatest impact upon those religious organizations which, through either religious belief or perceived practical necessity, look to the public at large rather than to a discrete and stable membership for their support. As a class, then, religious societies which, by scriptural command, spread their beliefs through "missionary evangelism," seeking "through personal visitations to win adherents to their faith," *Murdock v. Pennsylvania*, 319 U.S. 105, 108-09 (1943), are more likely to be disadvantaged by the Act. The Act will similarly tend to disfavor "newly organized or minor cults and creeds," which, lacking a solid base of existing support, must solicit funds from prospective sympathizers. *Troyer v. Town of Babylon*, 483 F. Supp. 1135, 1139 (E.D.N.Y.) (Unification Church), *aff'd mem. sub nom. Troyer v. Town of Southampton*, 628 F.2d 1346 (2d Cir.), *aff'd mem.*, 449 U.S. 988 (1980).

The point, of course, is not that the Charitable Solicitations Act is invalid *because* of these disparate effects. Nor is it that the existence of diparate effects necessarily proves *actual* improper legislative motivation. The point, rather, is that in enacting a law that distinguishes expressly between religious organizations, as opposed to one that is neutral on its face but has de facto differential effects, legislators are more likely to be aware of, and perhaps be influenced by, the possibility of such unequal effects.[10] Whether or not

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[10]This risk is concretely illustrated in the legislative deliberations over the 1978 amendment at issue here. During a senate committee hearing on the 1978 amendment, one senator stated his understanding that the proposed selective exemption "is an attempt to deal with the religious organizations which are soliciting on the streets and soliciting by direct mail but who are not substantial religious institutions in . . . our state." Shortly thereafter, another senator asked an assistant attorney general who had helped draft the amendment, "[A]s I understand it, what you're

actual improper motivation can be proved, such laws are at the very least suspect because of the greater risk that their enactment may have been tainted by improper considerations.

For all these reasons, laws like the Charitable Solicitations Act that expressly accord favored status to only some religious organizations pose a different, and far more serious, threat to the policies underlying the establishment clause than laws having a mere de facto disparate impact. And although laws expressly granting special benefits to some religious organizations and not others may not be as problematic under the establishment clause as laws distinguishing expressly between religious organizations by name, and may thus not be subject to the same "absolute" prohibition, they should at the very least be held invalid unless justified by, and closely fitted to, a substantial governmental interest.

B. The fifty percent member-funded criterion of the religious exemption provision is not substantially related to a significant governmental interest.

Under any standard but the most lenient, the favored status granted some religious organizations under the Charitable Solicitations Act cannot stand. The sole explanation offered by the state affords barely a rational basis for the selective exemption, much less the showing necessary to satisfy the demands of the establishment clause in this circumstance.

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trying to get at here is the people that are running around the airports and running around streets and soliciting people — and — are you trying to remove them from the exemption that normally applies to religious organizations, is that correct?" He received the response, "It is." Finally, a senator who apparently had some reservations about the proposed selective exemption stated, "I'm not sure why we're so hot to regulate the Moonies anyway. [Laughter]." *Hearings on Proposed Amendments to the Minnesota Charitable Solicitations Act Before the Minn. Senate Subcomm. on Judicial Administration of the Minn. Senate Comm. on Judiciary* (Mar. 7, 1978) (audio tape). [Note: Minnesota legislative history is recorded by voice tape. Jur. St. 12 n. 6. See *id.* 12-13.]

The state claims that the Act serves the public interest in minimizing fraud in charitable solicitations through public reporting and disclosure. Brief for Appellants at 27. As the court of appeals recognized, that purpose is no doubt a salutary one and one that may be advanced by the Act as a whole. Jt. App. A-137, 637 F.2d at 567. It is, however, undercut rather than furthered by the selective religious exemption. Indeed, that exemption stands logic on its head. Concerns over possible fraud and the need for public disclosure are obviously greater, for example, when an *exempt* religious organization receives from non-members $1 million in charitable contributions, even if that constitutes less than half of the organization's total contributions, than when a *non-exempt* religious organization receives $20,000 from non-members, even if that constitutes more than half its total charitable contributions. The operation of the Act thus flies in the face of all reasonable expectations and does not "follow[] any 'natural perimeters' of public policy concerns." *Id.* A-135, 637 F.2d at 565 (quoting *Welsh v. United States*, 398 U.S. 333, 357 (1970) (Harlan, J., concurring)).

Before the court of appeals, the state failed to offer "any explanation for the sizable loophole created for some religious organizations." See *id.* A-136, 637 F.2d at 566. Before this Court, however, the state attempts to construct such an explanation. In essence, the state maintains that when more than fifty percent of a religious organization's funds come from its own members, those members may confidently be relied upon to supervise the organization's fund-raising practices so as to protect not only themselves, but somehow the public as well. When more than fifty percent of a religious organization's funds come from the public, however, the organization's members, the state argues, can no longer be trusted to supervise the organization's fund raising practices, and the state must then step in to

assume this supervisory role. Brief for Appellants at 28-30. In the state's view, "when an organization raises more than half its money from non-members, it becomes by definition more the financial creature of the public than of its internal membership." Jur. St. 18.

Even putting aside the rather disquieting notion that a religious organization could ever become, "by definition" or otherwise, the "financial creature" of the general public, a notion that in itself suggests grave first amendment questions, the state's purported explanation of the selective exemption is doubtful at best. If there is a "need for public disclosure," Brief for Appellants at 29, with respect to organizations receiving relatively small total contributions from the public, there is an even greater "need" for such disclosure with respect to organizations receiving relatively large total contributions from the public, whether the organization looks to the public for more or less than fifty percent of its support. There is, simply, nothing talismanic about the fifty-percent cut-off.

An exempt religious organization, dependent upon the public for less than half its support, is no less likely than a non-exempt organization to engage, for example, in misrepresentation in its public solicitations if it believes that to be an expedient means of increasing its total revenues. That an organization receives more than half its funds from members bears no substantial relation to its incentive or potential willingness to employ improper practices in its solicitation of funds from the public.

Moreover, there is no reason to believe that organizations raising more than half their funds from members are substantially more likely than other organizations to provide their members with detailed information about their financial affairs. The state's discussion of this point, it should be noted, relies upon an incomplete and misleading analysis

of the Minnesota statutes governing the right of members of religious organizations to obtain information about the organizations' finances. The state cites Minn. Stat. § 317.28 (1980), for example, which grants members of non-profit organizations the right to inspect books and records and to obtain an accounting. Brief for Appellants at 28. Only organizations organized under *id.* ch. 317, the general non-profit corporations statute, however, have such rights. Religious organizations may be organized in other states and, more important, even in Minnesota they may be organized under *id.* ch. 315, which is designed to deal specifically with religious associations and which contains no provision for the regulation, supervision, inspection, or control of fund raising activities or records by members. In any event, even if a religious organization were for some reason organized under chapter 317, its members' right to examine its books and records would in no way be dependent upon the percentage of funds raised by the organization from the public. The selective exemption at issue in this appeal thus cannot sensibly be justified by reference to chapter 317.

Beyond this, however, the state seriously overestimates both the power and likely incentive of members of exempt religious organizations to protect the interests of non-members. Although parishioners in some Protestant denominations may have the power to oversee and participate in church management, members of highly structured, hierarchical churches would have no general claim to such supervisory powers. And even if information concerning an exempt religious organization's financial affairs is in fact available to members, and those members happen to have the power to influence the organization's practices, there is little reason to believe that such members would have any particular incentive to protect the interests of non-members.

And, of course, the members of exempt organizations would not have any greater incentive to protect the interests of non-members than would the members of non-exempt organizations. Similarly, the members of religious organizations receiving more than half their funds from members are no more likely than the members of organizations receiving less than half their funds from members carefully to supervise their organization's expenditures for, in either situation, the individual member's own money is equally at stake.

The state's explanation of the Act's selective exemption of some, but only some, religious organizations is dramatically undercut by the Act's inconsistent treatment of non-religious charitable organizations. The state asserts that "the criterion in the religious exemption [is not] so unique as to give rise to the suspicion that it is actually a religious based differentiation in another form. The same criterion applies to fraternal, patriotic, and professional organizations (exemption d). . . ." Brief for Appellants at 11.

In fact, however, the fifty-percent "criterion in the religious exemption" *is* "unique;" under the Act, even where non-religious charitable organizations receive more than half (but less than all) their support from members, they are not exempt from the reporting and disclosure requirements. Indeed, the only roughly analogous exemption for non-religious charitable organizations — "exemption d" — covers only a narrow class of such organizations which limit "solicitation of contributions to persons who have a right to vote as a member." Minn. Stat. § 309.515(1)(d) (1980). The failure to grant an exemption to charitable organizations indistinguishable from exempt religious organizations in all respects relevant to the state's claimed rationale thus indeed "give[s] rise to the suspicion that [the selective exemption]

is actually a religious based differentiation" and strongly suggests that the selective exemption at issue in this appeal cannot fairly be justified in terms of the state's asserted explanation.[11]

Whatever interest the state may be seeking to further by granting a special exemption to some, but only some, religious organizations from the reporting and disclosure requirements of the Act, it has failed entirely in its effort to demonstrate either that that interest is substantial or that it bears a substantial relation to the exemption as drafted. If government is ever permitted expressly to grant favored status to some, but not all, religious organizations, it must support such extraordinary legislation with a much stronger showing of justification than that here offered by Minnesota.

C. *Gillette v. United States* is not controlling here because the statute in *Gillette* had only a de facto disparate impact upon religions, did not make a de jure religious differentiation, and was, in any event, supported by an overriding government interest.

Throughout this suit, the state has fastened on *Gillette v. United States*, 401 U.S. 437 (1971), as controlling authority for its position that the Charitable Solicitations Act's express grant of an exemption to some, but only some, religious organizations does not violate the first amendment's proscription of laws respecting an establishment of

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[11]The state's assertion that the court of appeals was wrong in suggesting that a different question might be presented if religious organizations, like non-religious charitable organizations, were exempted only if funded *solely* from internal sources, Brief for Appellants at 30, is itself in error. In such circumstances, the express distinction among religious organizations would be eliminated, for such organizations would then be subsumed under the provision governing *all* charitable organizations. Moreover, whether or not ultimately constitutional, an exemption limited to organizations funded *entirely* by their own members is obviously more defensible than the exemption here at issue.

religion. Brief for Appellants at 20-22, 26. Every judicial official who has considered that contention in this litigation has correctly recognized that *Gillette* does not control this case.

In *Gillette*, the Court considered the constitutionality of the conscientious objector provision of the Military Selective Service Act of 1967, 50 U.S.C. app. § 456(j) (1976), which relieved from conscription those with conscientious religious scruples in opposition "to participation to war in any form." The Court rejected a claim that because the statute had the effect of failing also to relieve from conscription religious objectors only to particular wars, it worked an establishment. As the Court emphasized, the "critical weakness" of the claim that this provision was invalid under the establishment clause arose from the fact that the statute did not "on its face . . . discriminate on the basis of religious affiliation or religious belief . . . ." *Gillette v. United States, supra*, 401 U.S. at 450. Indeed, a law drawn on the basis of beliefs concerning war is no more an *express* religious discrimination than a law prohibiting the use of peyote or the practice of polygamy or regulating the operation of radio stations or the sale of securities.

Thus, "properly phrased," the establishment clause contention in *Gillette* was simply that the failure to exempt selective conscientious objectors amounted to a mere "de facto discrimination among religions." *Id.* at 451-52. As already explained, see pp. 17-21, *supra*, the Minnesota Charitable Solicitations Act's *express* line-drawing between classes of religious organizations poses a sharply distinct analytical issue and creates a far more substantial threat to the constitutional guarantee that government may not "single out any religious organization . . . for special treatment." *See Gillette v. United States, supra*, 401 U.S. at 451.

Gillette is clearly distinguishable from the instant case for another reason as well. Unlike the Charitable Solicitations Act, the statute at issue in *Gillette* was supported by overriding governmental interests arising from the duty of Congress under article I, section 8, of the Constitution to provide for the national defense. *See Rostker v. Goldberg*, 101 S. Ct. 2646, 2651 (1981) ("[P]erhaps in no other area has the Court accorded Congress greater deference" than in matters of "national defense and military affairs."). *See also Brown v. Glines*, 444 U.S. 348 (1980); *Greer v. Spock*, 424 U.S. 828 (1976); *Parker v. Levy*, 417 U.S. 733 (1974). The present Act plainly serves no such overriding interest.

D. Although the tests of *Lemon v. Kurtzman* need not be applied to this case of explicit state preferential treatment of only some religious organizations, the Minnesota statute violates both the principal or primary effect and excessive government entanglement branches of *Lemon*.

The court of appeals correctly perceived that laws that expressly prescribe differential governmental treatment of religious groups are inherently and strongly disfavored under the establishment clause and that the constitutional concerns thus evoked are so fundamental to the interests safeguarded by the clause that such laws may be upheld, if at all, only if they are closely tailored to further governmental policies of overriding importance. *See* Jt. App. A-136, 637 F.2d at 566. Since the expressly selective exemption here at issue could not satisfy this standard, the court noted that the statute contravened core establishment principles of neutrality. *See id.*

As an alternative ground of decision, however, the court of appeals held the statute invalid under the three-fold criteria enunciated in *Lemon v. Kurtzman*, 403 U.S. 602

(1971). Although clearly correct in invalidating the statute under *Lemon*, the court of appeals was also correct in placing primary emphasis on the neutrality principle.

The *Lemon* test comprises three criteria: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster 'an excessive governmental entanglement with religion.' " *Lemon v. Kurtzman, supra*, 403 U.S. at 612-13 (citations omitted).

The difficult and intricate inquiries required by the *Lemon* tests were designed primarily to evaluate the constitutionality of government programs providing benefits to *all* religious organizations. Indeed, the *Lemon* formulation originated in a school aid case, a situation in which establishment issues are especially subtle. In *Lemon* and in subsequent cases of a similar nature, the Court faced the task of applying the language of the religion clauses in contexts in which "the lines of demarcation" can "only dimly [be] perceive[d]." *Id.* at 612. In cases like the present, where a law conflicts *on its face* with the establishment clause's core guarantee of neutrality, application of the *Lemon* tests is unnecessary.

If *Lemon* is applied to the Minnesota Charitable Solicitations Act, however, the selective exemption is clearly invalid. In applying the *Lemon* standards in this case, the district court held that the primary effect of the exemption was to benefit some churches at the expense of others, and that it threatened to entangle the state in religious affairs, Jur. St. A-18 to -19 (order granting summary judgment), *incorporating by reference id.* A-24 (magistrate's report and recommendation on summary judgment), *incorporating by reference id.* A-62 to -65 (magistrate's report and recommendation on preliminary injunction); the court of appeals,

applying the *Lemon* standards, held that the selective exemption violated the first and second prongs of the test, finding it unnecessary to consider whether it violated the third prong as well.

In light of the arguments presented by the state to the court of appeals, that court's finding that the Act did not pass constitutional muster under the first prong of the *Lemon* standard is fully supportable. As noted, the state failed to offer the court of appeals "any explanation for the sizable loophole created for some religious organizations." 637 F.2d at 566. Accordingly, the court of appeals had no recourse but to find that the Act had no valid secular purpose.[12] Before this Court, however, the state maintains for the first time that the selective exemption is explicable because members of exempt religous organizations are supposedly more likely than members of non-exempt religious organizations to supervise the organization's fund-raising practices. As already demonstrated, this explanation is tenuous at best, and thus is unlikely to satisfy the requirement of a valid secular purpose. The Court need not reach that question, however, for the selective exemption is clearly invalid under the second and third prongs of the *Lemon* standard.

1. Principal or primary effect.

Both the court of appeals and the district court correctly found that the Act failed to satisfy the second prong of the *Lemon* standard, that, to be valid, a statute's "principal or

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[12]In criticizing the court of appeals for speculating "that the law in question was the result of intentional and invidious discrimination by the Minnesota legislature," Brief for Appellants at 15, the state fails to comprehend the court of appeals' dilemma — a dilemma of the state's own making. As that court quite reasonably observed, "intentional discrimination is a very real issue" precisely because of the state's failure of explanation. Jt. App. A-136. 637 F.2d at 566. As explained earlier, see pp. 22-23, *supra*, the presence or absence of an *actual* improper motivation is not the issue in this appeal.

primary effect must be one that neither advances nor inhibits religion . . . ." *Lemon v. Kurtzman, supra,* 403 U.S. at 612." [W]hatever its legislative purpose, the Act has the immediate effect of subjecting some churches to far more rigorous requirements than others." Jur. St. A-63 (magistrate's report and recommendation on preliminary injunction). The principal or primary effect prong of the *Lemon* test does not require courts to engage in "metaphysical judgments." Rather, unless the effect of a law on religious affairs is "remote and incidental," it must be invalidated if it carries even the "possibility" that it might " '*in part* have the effect of advancing religion.' " *Committee for Public Education & Religious Liberty v. Nyquist,* 413 U.S. 756, 783 n. 39 (1973) (emphasis in the original) (quoting *Tilton v. Richardson,* 403 U.S. 672, 683 (1971)). In light of the "material burdens" that "certain religious groups will suffer . . . as a result of the obligations imposed by the act," Jt. App. A-143, 637 F.2d at 569, there can be little doubt that, by exempting some, but only some, religious organizations from these obligations, the Minnesota scheme fails the second prong of the test. See pp. 14-23, *supra.*

2. Excessive government entanglement.

Although the Court need not reach the question, and may dispose of this appeal on the much narrower ground that the Act violates the guarantee of neutrality, there can be little doubt that the Act "foster[s] 'an excessive government entanglement with religion,' " and thus violates the third *Lemon* test as well. *Lemon v. Kurtzman, supra,* 403 U.S. at 613 (quoting *Walz v. Tax Commission, supra,* 397 U.S. at 674). *See Heritage Village Church & Missionary Fellowship, Inc. v. State,* 229 N.C. 399, 414-16, 263 S.E.2d

726, 735-36 (1980). Indeed, the Act imposes precisely the sorts of "sustained and detailed administrative . . . standards" that have repeatedly been condemned by the Court. *Walz v. Tax Commission, supra,* 397 U.S. at 675; *see NLRB v. Catholic Bishop,* 440 U.S. 490, 501 (1979); *Committee for Public Education & Religious Liberty v. Nyquist, supra,* 413 U.S. at 794-95; *Lemon v. Kurtzman, supra,* 403 U.S. at 619-22.

The Act sets up "[a] comprehensive, discriminating, and continuing state surveillance," *Lemon v. Kurtzman, supra,* 403 U.S. at 619, of non-exempt religious organizations. In order to effectuate the statutory enterprise, the Act first requires non-exempt churches to supply state authorities with detailed structural, organizational, and financial information on a regular basis. Minn. Stat. §§ 309.52-.53 (1980). These already comprehensive data may be supplemented through the plenary subpoena powers granted by *id.* § 309.533(2), and the prerogative of "public or private investigations within or outside the state" vested under *id.* § 309.533(1)(a).

The entanglement of the state in religious affairs does not end with the obtaining of information.[13] Rather, the Act authorizes state officials to use the information they obtain for purposes that themselves contravene the third *Lemon* prong.

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[13]The statute's requirements are thus poles apart from the mere passive provision of information for the purpose of informing the public, *see Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 637-38 (1980), assuming *arguendo* that a scheme of even that nature may constitutionally be imposed upon churches as distinguished from the non-religious charitable organizations affected by the Illinois law cited in *Schaumburg. Id.* at 638 n.12. The state's apparent assertion to the contrary, Brief for Appellants at 29, notwithstanding, *Heffron v. International Soc'y for Krishna Consciousness,* 101 S.Ct. 2559, 2568-72 (1981) (Brennan, J., concurring in part and dissenting in part), does not propose the validity of such a hypothetical law.

The Act empowers state officials, for example, to "suspend or revoke" the right of non-exempt religious organizations to solicit contributions if they find that the organization has violated the Act *and* that such revocation or suspension is "in the public interest." Minn. Stat. § 309.532(1) (d) (1980). For the state to operate in this context under a "public interest" standard is wholly foreign to the first amendment's guarantee that government "chart a course that preserve[s] the autonomy and freedom of religious bodies . . . ." *Walz v. Tax Commission, supra,* 397 U.S. at 672. Under such a scheme,

> [t]he potential exists for the state not only to substitute its own judgment as to the substantive "purpose" of a particular expenditure, but also to inject itself into the very center of religious disputes. Absent narrow circumstances of outright fraud or collusion or other specific illegality, the propriety of a religious organization's expenditures can be evaluated only by reference to the organization's own doctrinal goals and procedures. The question of proper purpose is an ecclesiastical one, and its resolution necessarily entails an interpretative inquiry into possible deviations from religious policy. "But this is exactly the inquiry that the First Amendment prohibits . . . ."

Heritage Village Church & Missionary Fellowship, Inc. v. State, supra, 299 N.C. at 415, 263 S.E. 2d at 735-36 (footnote omitted) (quoting *Serbian Eastern Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 713 (1976)).

Similarly impermissible entanglements arise out of the Act's overly broad authorization to state officials to undertake investigation and surveillance to determine whether a non-exempt religious organization "expends or agrees to expend an unreasonable amount for management and general costs and fund raising costs," Minn. Stat. § 309.555(1a)

(1980), and, upon making such a determination, to strip the organization of its "eligib[ility] to maintain registration," *id.*, and, hence, of its right to solicit funds from the public. *Id.* § 309.52(1). These processes unconstitutionally enmesh the state in the internal, and appropriately autonomous, affairs of religious organizations.

As is apparent from examination of the statutory scheme, such examples could be multiplied. Indeed the coercive powers granted to the state under the Act may apply even to churches that believe themselves exempt, since the investigative authority extends to the commissioner's discretionary judgment that "any person . . . is about to violate any provision of [the Act] or any rule or order thereunder . . . ." Minn. Stat. § 309.533(1) (a) (1980). The "self-perpetuating and self-expanding propensities," *Lemon v. Kurtzman, supra*, 403 U.S. at 624, of the statute are thus all too evident on its face. The interaction, in sum, of the state's powers of investigation and surveillance and the purposes to which the information obtained are put results in a pervasive state-church "relationship pregnant with dangers of excessive government direction . . . ." *Id.* at 620.

II.

APPELLEES HAVE ALLEGED INJURY IN FACT AS A RESULT OF ENFORCEMENT OF THE MINNESOTA CHARITABLE SOLICITATIONS ACT AND THEREFORE HAVE STANDING TO RAISE ESTABLISHMENT CLAUSE CLAIMS.

As the Court has often observed, whether a party has "*alleged* such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues" is "the gist of the question of standing." *Baker v. Carr*, 369 U.S. 186, 204 (1962) (emphasis added). *Accord, e.g., Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 72 (1978);

Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 41 (1976); *Sierra Club v. Morton*, 405 U.S. 738, 740 (1972). There is no question here but that appellees have alleged that the Unification Church is a religious organization. Jt. App. A-3 to -6. The declaration of appellee Larry Haft, moreover, sets forth factual details of the Unification Church's religious tenets and practices. *Id.* A-7 to -14. Hence, appellees have alleged that they are injured in fact by the establishment of religion created by the Act's selective exemption of only some religious organizations, and they therefore have standing to raise the establishment issue.[14]

The factual setting from which this litigation arose makes appellees' injury by virtue of the challenged Act particularly clear. As indicated in the statement of the case, the Act prior to 1978 exempted all religious organizations from its coverage. Shortly after the 1978 amendment carved out some religious organizations as non-exempt, the state advised appellees to register if they intended to continue fund raising in Minnesota. Thereafter, the state filed an action against appellee Unification Church claiming that its failure to register violated the Act. *State v. Holy Spirit Association for the Unification of World Christianity*, File No. 431272 (Minn. Dist. Ct. 2d Dist., filed Nov. 6, 1978). The state's own actions thus demonstrate that appellees are adversely affected by the Act and, accordingly, have standing to challenge its validity.

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[14]Appellees have not sought to disturb the decision of the court of appeals to remand the action for the purpose of affording "[t]he parties . . . an opportunity to develop the record and obtain rulings below" as to the question of whether the Unification Church is in fact a religious organization. Jt. App. A-145, 637 F.2d at 570. Thus, the very inquiry that the state seeks is mandated by the terms of the Eighth Circuit's opinion in any event.

Moreover, this Court's establishment clause decisions clearly refute the state's contention that appellees lack standing in the absence of a prior judicial determination that the Unification Church constitutes a religious organization within the meaning of the Act. In no decision of this Court has actual inquiry into the religious beliefs or practices of a litigant raising an establishment clause claim been required. To the contrary, in determining whether individuals "have standing to complain that the statutes are laws respecting the establishment of religion," this Court has inquired only as to whether such individuals "have suffered direct economic injury" allegedly due to the operation of the law in question. *McGowan v. Maryland*, 366 U.S. 420, 430-31 (1961).

Compared to the attenuated effects of the laws this Court has in the past held justiciable under the establishment clause, the direct effects of the registration and disclosure requirements are more than sufficient to support a finding of standing. *See, e.g., School District v. Schempp*, 374 U.S. 203 (1963). The effects on appellees are prohibition or inhibition of their activities rather than mere passive participation in practices offensive to them. Moreover, the indirect pressure implicit in the operation of the Act to alter one's solicitation practices in order to avoid the statute's burdens reinforces the conclusion that appellees have standing. *Cf. Engel v. Vitale*, 370 U.S. 421, 431 (1962) ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.") It is thus

entirely appropriate that the Court consider the merits of this case.[15]

CONCLUSION.

For the foregoing reasons, the judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed.

Dated: September 18, 1981.

Respectfully submitted,

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[15]Moreover, to avoid enmeshing federal courts in difficult and consitutionally problematic inquiries into whether organizations are in fact "religious," prudential considerations strongly suggest that any organization making a colorable claim to qualifying as "religious" be accorded standing to raise an establishment claim. *Cf. Thomas v. Review Bd.*, 101 S.Ct. 1425, 1431 (1981) ("[T]he judicial process is singularly ill equipped to resolve [scriptural] differences in relation to the Religion Clauses.").